

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSHUA S. HERRERA,
Plaintiff,

v.

J. ORTEGA, et al.,
Defendants.

Case No. 20-02035 BLF (PR)

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

Plaintiff, a state prisoner at the Salinas Valley State Prison (“SVSP”), filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against prison staff at SVSP as well as an appeals examiner at the Office of Appeals. Dkt. No. 1. Plaintiff’s motion for leave to proceed *in forma pauperis* will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim

1 upon which relief may be granted or seek monetary relief from a defendant who is immune
2 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
3 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under the
7 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff claims that on June 11, 2019, he was the subject of a retaliatory search of
10 his cell by Defendants J. Ortega, R. Castillo, B. Duran, and R. Cardona, when he refused to
11 withdraw an inmate grievance challenging the placement of a confidential memo in his
12 file. Dkt. No. 1 at 3-4. Defendant R. Castillo authored the memo, and Defendant R.
13 Mojica reviewed and signed his approval. *Id.* at 4, 6, 8. Plaintiff challenges the
14 confidential memo as a “slandorous defamatory accusation without merit and with zero
15 evidence.” *Id.* at 6. Plaintiff claims the inclusion of the confidential memo in his file
16 without an opportunity to be heard violated due process, and the refusal by Defendants to
17 remove it constitutes cruel and unusual punishment under the Eighth Amendment. *Id.*
18 Plaintiff claims Defendants M. Valdez and G. Bickham violated his First Amendment right
19 to file 602 appeals by refusing to remove the confidential file and covering up “his cohorts
20 deliberate falsifications.” *Id.* at 7

21 **1. First Amendment - Retaliation**

22 “Within the prison context, a viable claim of First Amendment retaliation entails
23 five basic elements: (1) An assertion that a state actor took some adverse action against an
24 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled
25 the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably
26 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th
27 Cir. 2005) (footnote omitted). Plaintiff allegations against Defendants J. Ortega, R.

1 Castillo, B. Duran, and R. Cardona are insufficient to state a retaliation claim because he
2 fails to satisfy the fourth and fifth elements above, i.e., that their actions chilled the
3 exercise of his First Amendment rights and did not reasonably advance a legitimate
4 correctional goal. *Id.* This claim shall be dismissed with leave to amend for Plaintiff to
5 attempt to state sufficient facts to satisfy all the elements for a retaliation claim.

6 **2. Eighth Amendment Claim**

7 Plaintiff's allegation that the inclusion of the "slandorous defamatory" confidential
8 memo violates the Eighth Amendment fails to state a claim. A prison official violates the
9 Eighth Amendment when two requirements are met: (1) the deprivation alleged must be,
10 objectively, sufficiently serious, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing
11 *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)), and (2) the prison official possesses a
12 sufficiently culpable state of mind, *id.* (citing *Wilson*, 501 U.S. at 297). Plaintiff's
13 allegation that the inclusion of allegedly false information in his file will have an adverse
14 effect "with the parole board and court, etc.," is conclusory and speculative. Furthermore,
15 there is no allegation that the confidential memo has subjected Plaintiff to inhumane prison
16 conditions that amount to "cruel and unusual punishment." Lastly, there is simply no
17 caselaw supporting Plaintiff's assertion that the "reckless disregard for the truth"
18 constitutes an Eighth Amendment violation. Accordingly, the Eighth Amendment claim is
19 DISMISSED for failure to state a claim.

20 **3. Due Process - Administrative Appeals**

21 Plaintiff's claim that his rights were violated by the appeals process also fails to
22 state a claim. He claims Defendant M. Valdez's refusal to grant his appeal at the second
23 level of appeal and Defendant G. Bickham's denial at the third level of appeal constitute
24 retaliation. However, such a claim suggests that every time an appeals examiner denies an
25 appeal it is retaliatory. Furthermore, Plaintiff fails to allege sufficient facts to state all the
26 elements for a retaliation claim, i.e., that these Defendants' actions chilled Plaintiff's
27 exercise of his First Amendment rights and did not reasonably advance a legitimate
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1 correctional goal. *See Rhodes*, 408 F.3d at 567-68. He may attempt to state a retaliation
2 claim against them in an amended complaint by alleging sufficient facts in support.
3 However, Plaintiff is advised that he must have separately exhausted his retaliation claim
4 against Defendants Valdez and Bickham before filing this suit. If he failed to do so, the
5 claims against them will be subject to dismissal for failure to exhaust. *See McKinney v.*
6 *Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002); *see Vaden v. Summerhill*, 449 F.3d 1047,
7 1051 (9th Cir. 2006) (where administrative remedies are not exhausted before the prisoner
8 sends his complaint to the court it will be dismissed even if exhaustion is completed by the
9 time the complaint is actually filed).

10 To the extent that Plaintiff is asserting a violation of substantive due process based
11 on the denials, he fails to state a claim. California Code of Regulations, title 15 §§ 1073
12 and 3084 grant prisoners in the county jails and state prisons a purely procedural right: the
13 right to have a prison appeal. The regulations simply require the establishment of a
14 procedural structure for reviewing prisoner complaints and set forth no substantive
15 standards; instead, they provide for flexible appeal time limits, *see* Cal. Code Regs. tit. 15,
16 § 3084.6, and, at most, that “no reprisal shall be taken against an inmate or parolee for
17 filing an appeal,” *id.* § 3084.1(d). Although there certainly is a right to petition the
18 government for redress of grievances, *see Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir.
19 1995) (a First Amendment right), there is no right to a response or any particular action.
20 *See Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991) (“prisoner's right to petition the
21 government for redress ... is not compromised by the prison's refusal to entertain his
22 grievance.”). Based on his allegations, Plaintiff was clearly not denied his right to have a
23 prison appeal. His disagreement with the disposition of those appeals give rise to a
24 constitutional violation. Accordingly, this due process claim must be dismissed for failure
25 to state a claim.

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1 **complaint in the time provided will result in the dismissal of this action without**
2 **prejudice and without further notice to Plaintiff.**

3 **IT IS SO ORDERED.**

4 **Dated: _September 3, 2020_____**


BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

25 Order of Dismissal with Leave to Amend
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